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No. 91-379



In The

# Supreme Court of the United States

October Term, 1991

AMERICAN ECONOMY INSURANCE COMPANY, *et al.*,

*Petitioners,*

v.

BEVERLY L. SMITH, *et al.*,

*Respondents.*

**Petition For A Writ Of Certiorari To The Court Of Appeals For The Second District of Texas**

## PETITIONERS' REPLY MEMORANDUM

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The petitioners American Economy Insurance Company and Lindsey & Newsom Claim Services, Inc., respectfully submit this reply memorandum in support of their petition for a writ of certiorari in this matter.

## ARGUMENT

The respondents mischaracterize this case as one involving fact questions and factual determinations by the courts below. The case arises on summary judgment; the respondents did not even attempt to controvert the summary judgment evidence produced by the petitioners. The decisions of the Texas courts in this case were

decisions of pure law, applying the provisions of ERISA to these uncontroverted facts. Neither the posture of the case nor the state of the record permitted any subjective fact-finding.

The respondents also mischaracterize the record. The undisputed evidence fails to show, as the respondents allege, that there was no interconnection between the workers' compensation portion of Braum's' employee benefit plan and the portions of the plan providing other benefits. It instead shows that Braum's' employee benefit plan "as a whole is designed to provide a broad spectrum of hospital, medical, life and disability benefits to eligible Braum's employees and their beneficiaries, regardless of whether the employee suffers a disability on or off the job." (R. 50-51). The record further shows that the self-insured benefit portion of the plan was "integrated" with the workers' compensation portion of the plan, providing benefits only when workers' compensation benefits were unavailable. (R. 103, 112, 180, 189).

The respondents' argument that workers' compensation benefits are in fact "required" in Texas, such that an employer who establishes a plan which provides those benefits necessarily does so "solely for the purpose of complying with applicable workmen's compensation laws," is an argument which proves too much. Although the state prescribes the form and content of workers' compensation policies,[1] it likewise prescribes the form

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[1] As an aside, however, the respondents are incorrect in stating that a Texas employer may not establish his own plan to compensate employees who suffer from occupational injuries. Such a plan may indeed be, and often is, established by an

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and content of general liability policies and many other forms of insurance which are in no sense "required." Although the state has established a Workers' Compensation Commission which regulates workers' compensation insurance, it has likewise established a State Board of Insurance which regulates other types of insurance, both required and non-required. Although state law prescribes the procedural and substantive sequelae which flow from the issuance of a workers' compensation policy, it does the same in the case of all other forms of required and non-required insurance. In short, none of the factors to which the respondents point gainsays the clear and unequivocal pronouncement of the Supreme Court of Texas that workers' compensation insurance in Texas "is strictly elective." *Consolidated Underwriters v. King*, 160 Tex. 18, 325 S.W.2d 127, 130 (1959).[2]

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employer who has chosen not to subscribe to workers' compensation insurance. The only state law limitation on such plans is that they do not trigger the benefits accruing to the employer under the Texas Workers' Compensation Act unless they include insurance or self-insurance which meets the terms of that Act.

[2] The respondents' reliance on the fact that Texas requires employers to give notice that they have declined to subscribe to workers' compensation insurance is curious; that requirement further demonstrates that such insurance is not required, else no provision for notice of non-subscription would be necessary.

Respectfully submitted,

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